

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

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J. W. VAN METER, B. B. GRANNING and  
J. D. M. TREECE,

*Appellants,*

VS.

FRANKLIN FIRE INSURANCE COMPANY of  
Philadelphia, Pennsylvania, a corporation,

*Appellee.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, NORTHERN DIVISION

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HONORABLE HOWARD C. SPEAKMAN, *Judge*

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APPELLANTS' REPLY BRIEF

---

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Seattle, Washington.

JUN 23 1947



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1. STIPULATION RELATIVE TO INSURING ONLY WHILE IN WASHINGTON MAY BE SUBJECT OF WAIVER OR ESTOPPEL.

Appellee argues in its brief that the provision in the policy involved in this case which stipulates

that the insurance covers only within the limits of the State of Washington is one that cannot be waived or be the subject of an estoppel. The fallacy of its argument is that it assumes that a stipulation in a fire insurance policy relative to location of the property is one of the class of stipulations which affects coverage in the sense that it cannot be waived or be the subject of an estoppel.

Every provision in a policy affects coverage or the protection afforded by the policy to a greater or lesser degree. In some cases it has been stated that the coverage of a policy cannot be extended by waiver or estoppel. However, the courts have not clearly defined exactly what is meant by provisions relating to coverage or restrictions on coverage. There are numerous cases where the doctrine of waiver or estoppel has been applied to hold the insurance company liable where under the written provisions of the policy, the insurance would have ceased or become void.

Furthermore, there is a distinction between a case where the facts relied upon as a ground for waiver or estoppel occur prior to or simultaneously with the issuance of the policy and a case where the facts relied on occur sometime subsequent to the issuance of the policy.

We must approach the consideration of this case with a view of determining whether the Washington court has held that a stipulation in a policy of

fire insurance to the effect that the property is protected only while located at a certain place or within a certain area may subsequently be waived or the insurance company estopped to rely on it.

The specific question as to whether a stipulation in a fire policy relating to location can be the subject of waiver or estoppel has been dealt with in at least three cases before the Supreme Court of the State of Washington, and in each of them the Washington Court held that such a stipulation could be the subject of waiver or estoppel.

Two of these cases, namely, *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, have already been dismissed at some length in appellants' opening brief.

In another case not previously referred to in the briefs, namely, *Norris v. China Traders Ins. Co.*, 52 Wash. 554, 100 Pac. 1025, the Washington Supreme Court had under consideration a factual situation bearing many marks of similarity to the instant case. The facts were that the insured had procured through an agent a policy of marine insurance. The policy stipulated that "the insured in accepting this policy hereby binds himself or themselves according to the following agreements and stipulations . . . 4. Not to use any port or places on the East coast of Asia north of Shanghai, nor islands adjacent thereto except ports of Japan . . . B. The

insured vessel to be employed in navigating in Puget Sound, British Columbia and Alaskan waters." Subsequently the vessel owners desired to send the vessel over to Siberia and inquired of the agent if the vessel would be covered by insurance. The agent informed the vessel owner that the vessel would be covered by insurance. The agent, however, testified that while such conversation took place, he stated that there would be a small additional premium depending on the ports the vessel might make. No endorsement or changes were made in the policy. In affirming a judgment allowing recovery for a loss occurring in waters outside those specified in the policy, the Court held that there had been a subsequent parol waiver of the stipulation limiting the territorial coverage of the policy.

*Norris v. China Traders Ins. Co.*, 52 Wash. 554, 100 Pac. 1025.

This case, and those of *Reynolds v. Canton Insurance Office*, 98 Wash. 425, 167 Pac. 1115, and *Henslin v. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, all involve policies insuring against fire and similar hazards, and a study of them reveals that the Washington Supreme Court is definitely committed to the rule that provisions in such policies relating to location of the property may be subject of parol waiver or estoppel.

Its holding on this point is in accord with what

is stated as a general rule on this subject by text writers.

26 Corpus Juris 281

45 Corpus Juris Secundum 619

3 Couch Cyl. of Ins. Law, Page 2445.

In the case of *Henslin v. United States Fire Insurance Co.*, *supra*, the Court had before it the question of whether the insurance company could be deemed to have waived a stipulation in the policy that the property was insured only while located at a certain place. In discussing this question, the Court said:

"We are not inclined to disagree with the authorities holding that an insurer may be precluded by estoppel from asserting conditions of an insurance policy."

*Henslin v. United States Fire Insurance Co.*,  
152 Wash. 637, 639, 278 Pac. 702.

The Supreme Court of Washington has not changed its rule on this question. Its decision in *Carew, Shaw and Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2d) 689, dealt with a different class of insurance contract, that is, burglary insurance. In that case, location of the valuables, against whose loss by burglary the insurance was issued, was the very essence of the contract. The incident insured against was the theft of money and valuables from a burglar proof chest within a safe. A vital factor in the risk was whether the money was in the chest inside the safe or merely within the safe. Insurance covering the former in-

stance bore a basic rate of \$5.00 per thousand and in the latter instance a rate of \$16.50 per thousand, and this was made known to the insured at the time the insurance was issued. In the instant case there is nothing to suggest that the risk of loss by fire in Washington would be any greater than in some other state. The question of whether a provision in a policy relative to location of property can be waived or the company estopped to rely on it depends on the type of hazard insured against and whether location is something that entered prominently into the calculation of the risk and premium.

Another ground for distinguishing the *Carew, Shaw and Bernasconi* case is that in that case the circumstances relied on for avoiding the effect of a written policy occurred prior to or at about the time of the issuance of the policy. In the instant case the facts relied upon as a ground for waiver or estoppel occurred subsequent to the issuance of the policy. Where the facts relied upon occur subsequent to the issuance of the policy, the appellants submit that there is no arbitrary rule limiting the type of clause or restriction that can be the subject of waiver or estoppel. In two cases referred to above, namely, *Norris v. China Trades Insurance Co.*, 52 Wash. 554, 100 Pac. 1025, and *Henslin V. U. S. Fire Insurance Company*, 152 Wash. 637, 278 Pac. 702, the facts relied on as a ground for waiver or estoppel occurred subsequent to the issuance of the

policy and in each instance the case was disposed of on the theory that there could be a waiver of or an estoppel to rely on a stipulation limiting coverage while the property was in a certain location. On this basis alone, the instant case and the decisions of the Washington Supreme Court on which appellants rely can be distinguished from the *Bernasconi* case.

In the case of *Fidelity & Guaranty Fire Corporation v. Bilquist*, 99 F. (2d) 333, 108 F. (2d) 713, the principal fact relied upon for relief, against the stipulation in the policy that the company insured the building "while occupied only for dwelling house purposes," was that the agent Langer "had known for several years that the property in question had not been used exclusively as a dwelling place, but that it was intended to be and was actually used as an inn, hotel and tavern." The knowledge of the agent relied upon as a ground for avoiding the effect of the stipulation insuring only while used as a dwelling house was knowledge he had at the time he issued the policy. If that knowledge, coupled with the fact that a policy was issued, had any implication, it was not that the insurance company was waiving the stipulation relative to use. The implication, if any, flowing from those facts was that the policy issued did not reflect the preliminary agreement of the parties and reformation was the only appropriate remedy.

It also appears from the concluding paragraph of the second opinion, 108 F. (2d) 713, that the rate on the building if used as a tavern was about five times the rate if used as a dwelling. The stipulation about the use of the building was obviously one that had an important bearing on the risk and the premium. One cannot disagree with the court's conclusion that in order to recover in that case plaintiffs were obliged to prove facts entitling them to reformation.

In the instant case there is nothing to suggest that the risk would be any greater outside the State of Washington than within the State. The facts relied upon as a basis for waiver or estoppel occurred subsequent to the issuance of the policy. Appellee's agents who signed the policy, more than any other person, were chargeable with knowledge of the provisions of the policy. After it had been brought to their attention that the insured's property had been moved outside the state, the appellee's agents issued a loss payable clause, requested payment of a balance on a premium and wrote other letters, the effect of which was to lead the appellants to believe that they were protected.

Having in mind the facts in the instant case, it would be difficult to find a more appropriate statement of the applicable rule than that contained in the following quotation from a decision of the Washington Supreme Court:

“The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy, or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estops the insured from relying thereon as a defense to an action on the policy.”

*Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 46, 28 Pac. (2) 310.

After careful study of many cases on this question, counsel for appellants believe that the various cases cited to this court, can be reconciled and the following is submitted as a correct statement of applicable principles:

(1) Where the provision or stipulation is one which enters prominently into the calculation of the risk or involves a description of the property, recovery, notwithstanding violation of the provision or stipulation, where based on knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had only upon the theory of reformation and upon evidence sufficiently clear and convincing to entitle one to reformation.

(2) Where the provision or stipulation is one which does not enter prominently into the calculation of the risk, recovery, notwithstanding violation of the provision or stipulation, where based on

insurance agent's knowledge or other facts in existence prior to or concurrent with the issuance of the policy, can be had on the theory of waiver or estoppel. Examples of stipulations or provisions coming within this rule are provisions prohibiting other insurance, removal of property from the area described in the policy, encumbering of property, etc.

(3) Where the effect of a stipulation or provision in a fire policy is sought to be avoided based on facts or transactions occurring subsequent to the issuance of the policy, there is no arbitrary limit as to what kind or class of stipulation can be the subject of waiver or estoppel. It is simply a question of whether the insurance company or its agent by its acts or conduct has led the insured to believe that he was protected against a particular hazard, when in fact he was not protected under the written provision of the policy, and thus has waived the provision or is estopped to rely upon it. In such a situation the question of whether the insured knew of the terms of the policy, goes only to the question of whether the insured relied on or was justified in relying on the acts of the insurance company or its agent.

Appellants respectfully submit that under these principles it is entitled to recover on the theory of waiver or estoppel.

## 2. EVIDENCE WAS SUFFICIENT TO WARRANT REFORMATION

In support of its contention that appellant Van Meter's testimony was not sufficiently clear and convincing to justify reformation, appellee refers to certain of his testimony appearing at pages 117 and 118 of the Transcript. Appellant Van Meter had previously testified that a marine type of policy had been explained to him which was good any place and it was this type of policy Esfeld agreed to have issued. (Tr. 82 and 83). When questioned by the Court, he reiterated these statements. (Tr. 116 and 117). The Court also inquired of the witness, as to whether anything was said about covering outside the State of Washington, and the witness replied that : "I don't think it was discussed either way." (Tr. 117).

Inasmuch as the type of policy agreed upon contemplated that it would have no territorial limitations, obviously there was no occasion for discussing whether it covered outside the State of Washington or only within the State. Once it had been explained to Van Meter that the policy was good any place, why should he ask whether it was good outside the State of Washington, or why should Esfeld make any statement along that line? The parties were obviously not thinking in terms of State boundaries. That was an element injected into the matter by appellee when it wrote up the policy.

The fact is that Esfeld agreed to have a policy issued insuring Van Meter against fire and other hazards. The property was movable and Van Meter had previously discussed with Esfeld the possibilities of his moving outside the State (Tr. 86, 118). Esfeld having agreed to procure a policy of fire insurance, the issuance of a policy of insurance which insured the property only while in Washington was not in compliance with that agreement.

Van Meter's statement that nothing was said either way about coverage outside the State of Washington, when considered in the light of his other testimony that the form of policy to be issued was one that protected him any place, brings out that there was no agreement that the broad territorial coverage of the form of policy agreed upon was to be limited by the boundaries of any particular state.

Aside from the fact that Van Meter did not agree to any provision that he was only to have protection while the property was in Washington, it appears that Morton Pinch, the agent who signed the policy, was unaware of the presence of this provision in the policy (Tr. 139, 140). The provision that the insurance covers only while within the limits of the State of Washington was a condition limiting the general scope of the policy. How can it be said that it reflected the preliminary agreement of the parties when nothing was said about any such limi-

tation or condition and neither was aware of its presence in the policy. Van Meter understood that a policy good any place was to be issued, and the agent of the appellee, having knowledge of the printed provisions and no awareness of the typewritten clause, obviously intended to issue a policy that was good anywhere in the United States. The later acts of both parties attest unequivocally to the fact that they both assumed and understood that there was no condition in the policy limiting the broad territorial coverage contemplated by the printed form of the policy.

### 3. APPELLANTS' FAILURE TO READ POLICY DOES NOT PRECLUDE RIGHT TO REFORMATION.

Appellee argues rather insistently that appellants were chargeable with knowledge of the terms of the policy and that Van Meter, not having availed himself of an opportunity to examine the policy, was guilty of negligence which would prevent reformation. Here the appellee again relies on the case of *Carew, Shaw & Bernasconi, Inc. v. General Casualty Co.*, 189 Wash. 329, 65 Pac. (2) 649.

Let us examine closely that case with this point in mind. In the first place the statement that the insured was chargeable with knowledge of the terms of the policy so as to preclude reformation was not necessary to the decision of the case. In its opinion

the Court said: "The appellant has not shown by clear, cogent and convincing evidence that there was a mistake or fraud in the issuance of the policy requiring reformation of the contract." (189 Wash. 339). Having found that the appellant was not entitled to reformation, the later statement in the opinion that his negligence and failure to read the policy would have precluded reformation in any event and was not necessary to the decision. Furthermore, in that case the facts recited in the opinion show that Lambuth, an agent of the insured who handled the insured's other insurance business, had the policy in his possession. The Court points out that "the most casual examination by Lambuth who was appellant's (insured's) agent and who discussed the policy and coverages with appellant's vice-president would have revealed to their agent the coverage afforded by the policy." The Court goes on to point out that "On October 10, 1934, Lambuth sent the policy to Shaw (vice-president of the insured) who manually handled the policy and maintained it in his possession." (189 Wash. 340). Furthermore, it appears from the statement of facts in the opinion that the basic rate on the insurance against burglary from within the chest was \$5.00 per thousand, while the rate on insurance against theft from the safe itself, which was only fireproof, would take a basic rate of \$16.50. The difference in these rates was fully explained to the insured.

How different is the situation here where the insured never saw the policy. Furthermore, a casual reading of the policy in the instant case would not have disclosed that the property was insured only while in Washington. Much more prominent is the provision that "this insurance covers only within the limits of the United States and Canada."

In support of its statement that it was the insured's duty to read the policy, the Washington Court in the *Bernasconi* case cites several earlier Washington decisions. A reading of these other cases shows that in each instance, except one, the statement was made with reference to a situation where the parties seeking to avoid the effect of the provision in question had signed the instrument. In one case, *McCann v. Reeder*, 178 Wash. 126, 34 Pac. (2) 461, the insured and his agent had received and had taken possession of the policy and neither denied that they had read the policy nor did they deny that they were aware of the false warranties therein. Two of the cases cited, namely, *Hayes v. Automobile Insurance Company*, 126 Wash. 487, 218 Pac. 252, and *Perry v. Continental Insurance Company*, 178 Wash. 24, 33 Pac. (2) 661, involved fire insurance policies. In those two cases it appears that the insured was trying to avoid the effect of false representations contained in an application for insurance signed by the insured. As a general rule it can be said that a person is chargeable with

knowledge of the contents of an instrument he signs. However, to extend the application of that rule to a situation where the insured never signed an application and never saw the policy, and the insurance company's agent knew the insured never saw the policy, would in effect be to hold that in no case would reformation of an insurance policy be possible. That is not the law in Washington or in any other state.

The Washington Court has held that the rules governing the reformation of written instruments are applicable to the reformation of an insurance policy. *Bjorkland v. Continental Casualty Company*, 161 Wash. 340, 297 Pac. 155.

It has held that a party's failure to discover a mistake in a written instrument does not preclude reformation. *Silbon v. Pacific Brewing & Malting Company*, 72 Wash. 13, 129 Pac. 581.

It has also aptly pointed out that if the negligence of the party was to defeat reformation there would be few contracts reformed. It has said:

"The appellants argue that the mistake was the result of the respondent's negligence and that he cannot have his deed reformed. If this were true, there would be few contracts reformed. Mistakes in written instruments are usually due to negligence on the part of one or both of the parties where there is no fraud. This Court has uniformly taken the view that conveyances in real property may be reformed so as to effectuate the actual intention of the parties where there has been a material and mutual mistake

and where that mistake has been shown by clear and convincing evidence.”

*Carlson v. Druse*, 79 Wash. 542, 548, 140 Pac. 570.

The answer to the question of whether knowledge or means of knowledg precludes reformation is that each case must be considered in the light of its own facts. This is well illustrated by the two decisions of this Court in *Fidelity Guaranty and Fire Corporation v. Bilquist*, 99 Fed. 2d 333, 108 Fed. 2d 713. When that case was first before this Court, it appeared from the statement of facts in the opinion that the insurance policy had been issued on about August 19, 1935, and that it had been left with the insured's mortgagee. The fire did not occur until September 12, 1936. It was obvious that the insured would have had an opportunity within that period to have examined the policy if he had been necessarily chargeable with knowledg of the terms of the policy. However, this court, on the basis of the facts then shown by the record, said: “Under this evidence we see no reason why reformation should not be granted.” (99 Fed. 2d 335).

When this case was before this Court the second time, it appeared from the facts that had been developed, that one of the insured who ordered the insurance had actually seen the policy and had had an opportunity to examine it and had noted one or two exceptions to the policy. Likewise, it appears that he was cognizant of the material difference in

the rate. With these facts before it, this Court held that reformation was not permissible. (108 Fed. 713). Thus, in its two decisions in this case, this Court has recognized the difference between a situation where an insured has examined the policy, or has had the policy in his possession, and a situation where the insured never saw the policy or never had it in his possession.

The Court's attention is again invited to the very respectable list of authorities cited on pages 20 and 21 of appellants' opening brief holding that mere failure to read a fire policy in ones possession is not such negligence as will preclude reformation.

In the instant case there was an agreement to issue a policy with broad territorial coverage. There was no agreement that the insurance was to be effective only while the property was in Washington. The subsequent act of both parties attest to the fact that that was the understanding, and, finally, in view of the circumstances, it cannot be said that the insured's failure to examine the policy should preclude his right to reformation.

Respectfully submitted,

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